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A. A. Robert

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 280 ➤

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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FILED FEBRUARY 18, 1925

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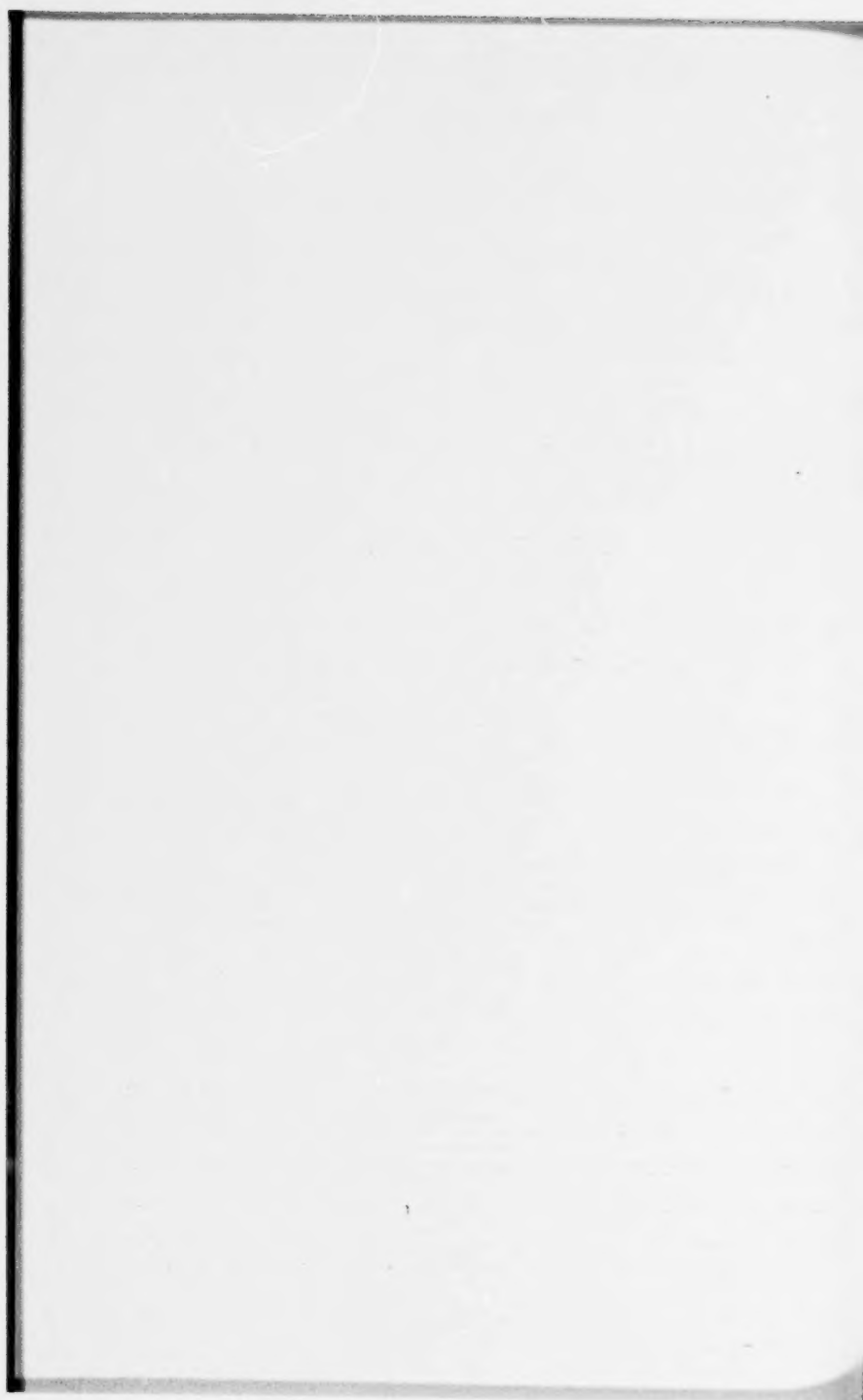
v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES****MISSOURI PACIFIC RAILROAD COMPANY****vs.****THE UNITED STATES****I. HISTORY OF PROCEEDINGS**

On May 31, 1923, the plaintiff filed its original petition.

On July 30, 1923, the defendant filed a demurrer to plaintiff's petition.

On January 9, 1924, the demurrer was argued and submitted by Messrs. George H. Foster and Joseph Stewart, for the defendant, and by Messrs. Fred H. Wood and Thomas Watt Gregory, for the plaintiff.

On March 31, 1924, the court filed an order sustaining the demurrer and dismissing the petition, with an opinion by Campbell, Ch. J.

(NOTE.—This opinion will be found on p. 30 of this record.)

On June 24, 1924, by leave of court, the plaintiff filed its amended petition. Said amended petition is as follows:

[fol. 2] **II. AMENDED PETITION—Filed June 24, 1924**

To the Honorable the United States Court of Claims:

Your petitioner, Missouri Pacific Railroad Company, by leave of court hereinbefore obtained, files this its amended petition and respectfully represents as follows:

I

Your petitioner is a corporation organized and existing under the laws of the State of Missouri and is engaged as a common carrier in the business of operating a system of railroads, together with branch lines and extensions in the State of Missouri, Arkansas, Colorado, Illinois, Kansas, Louisiana and Oklahoma. On June 1, 1917, your petitioner became the owner of the systems of railroad in said states theretofore owned by The Missouri Pacific Railway Company and St. Louis, Iron Mountain and Southern Railway Company, and [fol. 3] which for many years prior to said date were operated by the said last mentioned companies, or the duly appointed and qualified Receivers thereof, and has operated the same continuously since June 1, 1917, except during the period from January 1, 1918, to February 29, 1920, when the railway system of your petitioner was in the possession of and operated by the United States Government. Among the lines of railroad so acquired, owned and operated are

the lines in aid of whose construction the land grants described in paragraph 2 hereof were made.

II

The predecessors in interest of your petitioner were aided in the construction of that portion of the lines of railroad owned and operated by your petitioner which is located between St. Louis, Mo., and Pacific, Missouri, by certain grants of land made by the United States by an act of Congress of June 10, 1852, and in the construction of those portions of the said lines which are located between Birds Point, Mo., and Poplar Bluff, Missouri, between Poplar Bluff, Missouri, and Texarkana, Arkansas, and between Little Rock, Arkansas, and Ft. Smith, Arkansas, by certain grants of lands made by the United States by an act of Congress of February 9, 1853. Section 6 of the said act of 1852 provides as follows:

"That the United States Mail shall at all times be transported on said railroads under the direction of the Post Office Department, at such price as Congress may by law direct."

Section 6 of the said act of February 5, 1853, provides as follows:

"That the United States Mail shall at all times be transported on the said road and branches under the direction of the Post Office Department at such price as Congress may by law direct."

[fol. 4] Your petitioner is the lawful successor of the railroads in aid of whose construction said grants were made and as such is entitled to the benefits of said land grants, and is and was at all times in this petition mentioned subject to the duties and obligations thereby imposed including the express agreements made in the aforesaid sections of said act. Those portions of the owned and operated lines of your petitioner in aid of whose construction said land grants were made and which are specifically described above were between June 1, 1917 and December 31, 1917, both inclusive, located wholly within the limits of mail routes known to and designated by the Post Office Department of the United States as routes numbered 145519, 147526, 150571, part 1, 145505, 147517, 147525, 145537, part 1, and 147508, and between March 1, 1920, and December 31, 1923, and to the date of the filing of this petition were located wholly within the limits of mail routes so known and designated as routes numbered 107726 and 111795. Your petitioner and its predecessors in interest have in the operation of said lines of railway fully complied with the obligations imposed upon them by the said acts of Congress. The said acts of Congress will be hereinafter referred to for convenience as the "Land Grant Acts," the lines in aid of whose construction said grants of land were made, as described above, as "Land Grant Mileage," and the mail routes within which said Land Grant Mileage is located as "Land Grant Routes."

III

The administration of the postal service requires, first, suitable provision for the receipt of mail matter from the public; second, its assemblage, sorting and distribution into pouches, sacks, or other appropriate containers for transportation and in preparation therefor, technically known as "distribution," and hereinafter so [fol. 5] described; third, its transportation; and, fourth, its final delivery to addressee. The multitude of letters, postal cards, circulars, newspapers, magazines and parcels collected by letter carriers or deposited in post offices by the public and commonly known as mail matter are not each and severally ready for transportation when offered to the Post Office Department by the public. Moreover, the Post Office Department has devised, owns and employs bags of different sizes, classes and material, into which the mail matter is "distributed" and placed for transportation, and it is so offered to the railroads by the Post Office Department. Letters, postal cards and similar mail matter are "distributed" and placed in pouches which are locked, the keys of which are exclusively in possession of employees of the Post Office Department, and these pouches cannot be opened by railroad employees in the process of transportation. The papers and parcels delivered to railroad companies for transportation are "distributed" and placed in sacks prior thereto and railroad employees are forbidden to disturb or touch the contents of said sacks during their transportation. In the economical and expeditious dispatch of mails a large volume of mail matter is redistributed one or more times between point of receipt and final delivery, which said redistribution is accomplished by the opening of pouches, sacks, bundles or other containers of mail, and the redistribution of the matter thus assembled into appropriate containers for further transportation and delivery according to destination. For many years after railroads were made post roads and became mail carriers, all said distribution and redistribution was made in post offices. Thereafter the Post Office Department inaugurated a system whereby a portion of said distribution or redistribution should be made by employes of the Post Office Department in railway cars fitted up with letter cases, tables, racks and other fixtures similar to the facilities provided and used [fol. 6] for like purposes in ordinary post offices, commonly known as railway post offices, the nature and use of which will be hereinafter more specifically described, but such distribution was unknown and no such cars were in use or existence on any railroad in the United States at the time of the making of petitioner's land grant. The furnishing of railway post office cars for distribution greatly increased the space required and the expense incurred by railroad companies furnishing the same beyond that required and incurred in the mere transportation of the mails.

At the time of the inauguration of train distribution and at all times since the distribution performed in said cars has been recognized and undertaken by the Post Office Department as a function of the Post Office Department and as not embraced under any statutory or contractual obligation of your petitioner or of any other

railroad company to transport the mails, and the said distributing service has been at all times and is performed solely by the agents and employees of the Post Office Department riding in such cars, from which, under the rules of the Post Office Department, railway employees are excluded except to the extent that train crews are required to pass through said cars in the discharge of their duties. Between the inauguration of said train distribution and the passage of an act of Congress of July 28, 1916, hereinafter more specifically referred to, railway post office cars for the performance of said distribution were furnished by the petitioner and other railroads to the Post Office Department under contract and not otherwise.

After the said inauguration of train distribution mails were distributed in part in ordinary post offices and in part in railway post office cars. Subsequently the Post Office Department, as a measure of economy through the reduction of train distribution, established [fol. 7] at numerous railway centers in the United States what are known as terminal post offices as a substitute for railway post offices, which said terminal post offices are post offices located in or near railway stations wherein mails are redistributed in the manner aforesaid for the purposes of further transportation. There were during the period covered by the services hereinafter described approximately forty-seven such terminal railway post offices wherein the service performed is in all respects similar to that performed in railway post offices. From and after the establishment of such terminal post offices and throughout the period covered by the services hereinafter described, distribution was performed in part in ordinary post offices, in part in railway post offices, and in part in terminal post offices. A large part of the distribution of mails made in said terminal post offices was formerly made in railway post office cars, and the transfer of such distribution from railway post office cars to terminal post offices is an illustration of the fact that distribution is made where demonstrated to be most convenient or economical to the Post Office Department in the performance of its administrative functions, and not as a part of the transportation of the mails.

The said service of distribution wherever performed was and is performed exclusively by postal agents and employes, is similar in character and performance whether performed in ordinary post offices, terminal post offices or railway post offices, and wherever performed has ever since the inauguration of the postal service been recognized by the United States and its Post Office Department as a service separate and distinct from the transportation of the mails themselves. The extent to which distribution is performed in ordinary post offices, terminal post offices and railway post offices, respectively, is and at all times has been wholly at the election of [fol. 8] the Post Office Department and is and at all times has been governed wholly by the distributing policy and requirements of the Post Office Department and only incidentally by the volume of the mail to be transported.

By an Act of March 3, 1873, Congress in addition to providing compensation for the transportation of the mails on a scale of rates

fixed in said Act, provided for the making of additional allowances for furnishing railway post office cars for the sole purpose of compensating the railroads furnishing the same for the additional service performed in furnishing said cars and space therein for distribution, at rates fixed in said Act, and appropriated the necessary funds therefor and authorized their payment. Thereafter Congress from time to time appropriated funds to be used in payment for the transportation of the mails and in the making of additional allowances for the furnishing of railway post office cars at rates from time to time fixed by Congress.

By an Act of Congress of July 12, 1876, it was provided that all railroads which had been aided in their construction by land grants, requiring them to transport the mails at such a price as may be fixed by Congress, should receive but 80 per centum of the compensation accruing to other railroads under the rates of pay authorized by Congress for such other carriers which said foregoing provision of law remained in force until the passage of the Act of July 28, 1916, hereinafter referred to.

From and after the effective date of said Act of July 12, 1876, the Petitioner and all other railroad companies, which had received land grants similarly conditioned, received but eighty per centum of the rates authorized for payment to other railroads at the scale of rates from time to time fixed by Congress for the transportation of the mails, but for all services performed in furnishing railway post office [fol. 9] cars from the effective date of said Act to November 1, 1916, received the same compensation accruing to other railroads for the performance of a like service, notwithstanding the provisions of said Act, the making of which payments were duly authorized by appropriations made from time to time by Congress. Petitioner alleges that throughout said period payment of said additional allowances for railway post office cars to all railroad companies, including your petitioner and other railroads which had received land grants similarly conditioned, was made in recognition of the fact that the furnishing of said cars constituted a service in addition to the transportation of the mails, and that the practice throughout said period of paying for said service the same compensation accruing to other than land grant carriers, when considered in connection with the provisions of said Act of July 12, 1876, constitutes a contemporaneous construction of your petitioner's land grant, whereby the furnishing of said cars was treated as a service separate from and in addition to the transportation of the mails and as not embraced within the obligation of the petitioner to transport said mails at such price as might be fixed by Congress; and your petitioner alleges the fact to be that the furnishing of railway post office cars and distributing facilities therein is a service separate and distinct from and in addition to the transportation of the mails required by said land grant acts. And your petitioner further alleges that for all services performed by it in furnishing railway post office cars and distributing facilities therein from the date of the inauguration of said service down to and including November 1, 1916, it has received the full

compensation from time to time authorized therefor for other carriers, without deduction on account of said provisions of said land grant acts; that at no time during said period did your petitioner concede that the furnishing of said facilities for distribution was [fol. 10] within the obligation imposed upon it by said land grant acts, but, on the contrary, continuously asserted that the furnishing of said facilities constituted a service in addition to the transportation of the mails, and that throughout said period its right to the same compensation therefor accruing to other carriers was acquiesced in by the Post Office Department, and accepted by it as correct.

For terminal post offices located in railway stations both before and after the passage of said act of July 28, 1916, railroads have been paid compensation for the space furnished therein, in addition to compensation paid for the transportation of the mails, without deduction therefrom on account of any land grant obligation of the railroad company furnishing such space or joining in furnishing the same.

IV

Prior to an Act of Congress of July 28, 1916, the transportation of the United States mails by railroads was by means of voluntary contracts entered into between the several railway companies and the Post Office Department on the basis of weights ascertained according to law, with additional payments for full railway post office cars, as hereinbefore referred to, but this system was terminated by the said act, which was designed to and did cancel any provision for voluntary service by contract, and substituted therefor provision for the compulsory performance of all services defined in said act.

The said act of July 28, 1916 made it the duty of all railway companies from and after the passage of said act to provide the services defined therein to the extent and in the manner required by the Postmaster General, and all railway companies refusing or failing so to do were and are subject to the fines and penalties imposed by said act for such failure or refusal. The services so required to be performed [fol. 11] include both the transportation of the mails, and in addition thereto the furnishing of full railway post office cars and of apartment railway post office cars, hereinafter collectively described as "railway post office cars," for the purposes hereinafter described. Railway post office cars are cars constructed in accordance with plans and specifications made or approved by the Post Office Department which, in addition to space provided for the transportation of the mails, contain space occupied by letter cases, tables, racks and other fixtures, hereinafter collectively called "distributing facilities" which are provided in said cars solely for the purpose of the opening of pouches and sacks and distributing their contents and other classes of mail by the agents and employees of the Post Office Department, through the means of the facilities described and according to destination, into appropriate containers for transportation and delivery and are used for said purposes, the said service thus performed being hereinafter described as "distribution," and the space in said cars occupied by distributing facilities together with that furnished and necessary for the use of said agents and employees of the Post Office

Department in making said distribution, being hereinafter referred to as "distribution space." Among other things, the said act provides:

"All cars or parts of cars used for the railway mail service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary [fol. 12] drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. No pay shall be allowed for service by any wooden full railway post-office car unless constructed substantially in accordance with the most approved plans and specifications of the Post Office Department for such type of cars, nor for service by any wooden full railway post-office car run in any train between adjoining steel cars, or between the engine and a steel car adjoining. After the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies hereafter shall be constructed of steel. Until July first nineteen hundred and seventeen, in cases of emergency and in cases where the necessities of the service require it, the Postmaster General may provide for service by full railway post office cars of other than steel or steel underframe construction, and fix therefor such rate of compensation within the maximum herein provided as shall give consideration to the inferior character of construction, and the railroad companies shall furnish service by such cars at such rates so fixed."

The said act further provides:

"Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so."

[fol. 13] The purpose of requiring said cars to be placed in stations before the departure of trains is, among other things, to enable the Post Office Department to perform therein its administrative function of distribution in advance of the transportation of the mails thus distributed, and in accordance with said requirement petitioner has from time to time during the period hereinafter named placed railway post office cars in its stations in advance of the departure of its trains and frequently many hours in advance thereof whenever so required by the Post Office Department, and many hours in advance of the time when it would have been necessary to place

said cars in stations for the loading and transportation of the mails.

The said act further provides:

"If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper."

Distribution of the mails in said cars requires an intimate knowledge of the location of Post Offices off the line of the railroad transporting the mails therein distributed, of mail routes, and of practices and regulations of the Post Office Department in the performance of its administrative functions, none of which is possessed by railway employees, and said distribution is not and cannot be made by the employees of the railroad furnishing transportation, but is performed by expert agents and employees of the Post Office Department trained for said purpose, of whom there are sometimes as high [fol. 14] as six or seven engaged in distribution in a single car, which said agents and employees of the Post Office Department are carried in said cars by said railway companies without additional compensation, as required by law, and the mails therein distributed and all other mails in said cars contained are at all times within the sole custody of the agents and employees of the Post Office Department. The said distribution made in railway post office cars operated over petitioner's land grant routes was at all times herein mentioned and is now to a large extent of mail which is not taken on or put off the cars on said land grant routes but is made thereon by the said expert agents and employees of the Post Office Department for distant territory beyond said routes and beyond the lines of petitioner's railroad, and a large portion thereof consists of distribution for letter carriers in cities both on and off your petitioner's lines of railroad, in order to enable the Post Office Department to make final delivery of mails so distributed for letter carriers, without further distribution thereof at the Post Office in the city to which the same is addressed.

The said service of distribution is similar in all respects to a like service performed by agents and employees of the Post Office Department in ordinary post offices and the distributing facilities therein contained are generally similar to the distributing facilities provided and used for like purposes in ordinary post offices and in terminal post offices. The extent to which distribution is performed in railway post office cars and the extent to which it is performed in ordinary post offices or in terminal post offices is wholly at the election of the Post Office Department, and the extent to which your petitioner and other railway companies are required or authorized to furnish railway post office cars and the extent of the distribution space therein which they are required or authorized [fol. 15] to furnish, is determined by the Postmaster General wholly

by the volume of mail to be distributed therein and not by the volume to be transported, and is governed wholly by the distributing policy and requirements of the Post Office Department. The "distribution space" in said cars is physically separated from the remaining space therein and is susceptible of actual measurement. In the hereinafter described proceedings before the Interstate Commerce Commission the Post Office Department certified and the said Commission found that, in standard railway post office cars, constructed according to plans and specifications made by the Postmaster General, the total linear feet of space therein is made up as shown by the following table, taken from the report of the said Commission therein:

Unit	Distribution space		Doorways		Storage space		Letter separations	Paper separations	Portable letter separations	Storage space and closet facilities	
	Ft.	In.	Ft.	In.	Ft.	In.				Ft.	In.
60-foot full railway Post Office car	36	..	7	8	16	4	612	234	54	..	....
30-foot mail apartment car.....	17	2	2	10	..	..	312	106	..	10	....
15-foot mail apartment car.....	7	.75	2	6	..	..	156	46	..	4	6.25

Your petitioner alleges that the distribution of space in railway post office cars furnished by it over its land grant routes between June 1, 1917, and December 31, 1917, both inclusive, and between March 1, 1920, and December 31, 1923 was substantially as represented by the foregoing table; that during said period petitioner performed 3,438,350 miles of service in full railway post office cars over said land grant routes, 2,082,906 miles of service in 30-foot apartment railway post office cars over said land grant routes, and 1,089,158 miles of service in 15-foot railway apartment cars over said land grant routes; that not less than sixty per cent of the space furnished and hauled in connection with the aforesaid miles of service performed in railway post office cars, not less than fifty-six and two-thirds per cent of the space furnished and hauled in connection with the aforesaid miles of service in 30-foot apartment railway post office cars, and not less than forty-six and two-thirds per cent of the space furnished and hauled in connection with the aforesaid miles of service in 15-foot railway apartment cars over said Land Grant routes consisted of distributing space as hereinbefore defined, and was furnished and hauled solely for purposes of distribution and was used therefor, the performance of all of which service, including the furnishing of said distributing space, was duly authorized by the Postmaster General and furnished by petitioner under compulsion of the requirements of the said Act of July 28, 1916.

Your petitioner further alleges that it takes three full 60-foot railway post office cars to transport the same volume of mail that is transported in one ordinary baggage car wherein carloads of mail

are carried without distribution, and that it takes approximately three times the space in 30-foot and 15-foot railway apartment cars respectively to carry the same volume of mail which is carried in the equivalent space in ordinary baggage cars, where less than full carloads of mail are carried but not distributed.

Neither said distributing facilities nor any part of the distribution space in railway post office cars are required or necessary for the purpose of transporting the United States mail and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution. The total volume of mail transported in ordinary equipment, other than post office cars, greatly exceed the volume of mail transported in said cars, and the increase in space, required to be furnished, maintained and hauled by your petitioner by reason of the said service of distribution in excess of that required for transportation of the mails is not less than the proportion which the distribution space in said cars is of the total space therein.

Your petitioner has at all times subsequent to June 1, 1917, except during the period of Federal control, performed all services required by it to be performed under said act of July 28, 1916, to the full extent required or requested of it by the Postmaster General in accordance with authorizations of service made by him under the powers conferred by said act, including the furnishing, hauling and maintaining of railway post office cars, conforming in construction to the requirements of said act and of the Postmaster General thereunder, and equipped with distributing facilities of the character herein described and used for the purposes herein described. None of the distribution space in said cars, so furnished by your petitioner under the requirements of said act, was required for the purpose of the transportation of the mails or would have been required or authorized except for the performance of distribution therein by the agents and employees of the Post Office Department; and between June 1, 1917, and December 31, 1917, both inclusive, and from March 1, 1920, to December 31, 1923 your petitioner, by reason of the requirements of said act and in accordance with authorizations and requirements duly made by the Postmaster General thereunder, has furnished and has been required to furnish to the United States, over its Land Grant Mileage and elsewhere on its system of railroads, services in addition to the service of transportation, the extent of which additional service is represented and measured by the proportion which the distribution space in railway post office cars furnished by it under such authorizations bears to the total space in the said cars so furnished in accordance with the requirements of the Postmaster General and has furnished and been required to furnish to the United States [fol. 18] transportation for postal agents and employees engaged in said service of distribution in said cars and to incur with respect thereto the obligation of a common carrier of passengers for hire without additional compensation, all in addition to its obligation under said land grant act to transport the mails at such price as Congress might fix.

V

The said act of July 28, 1916, provided that the Interstate Commerce Commission, after hearing, and in proceedings to be instituted in a manner directed by said act, should from time to time fix and determine the fair and reasonable rates and compensation to be paid for all of the services described in said act and should prescribe the method or methods by weight, space, or both, or otherwise, for ascertaining such compensation, and that all railway common carriers should thereafter receive pay for the services required to be performed by them at the rates so fixed and determined by the Interstate Commerce Commission. The said act further provided as follows:

"Pending the decision of the Interstate Commerce Commission, as hereinafter provided for, the existing method and rates of railway mail pay shall remain in effect, except on such routes or systems as the Postmaster General shall select, and to the extent he may find it practicable and necessary to place upon the space system of pay in the manner and at the rates provided in this section, with the consent and approval of the Interstate Commerce Commission, in order to properly present to the Interstate Commerce Commission the matters hereinafter referred thereto: Provided, That if the final decision of the Interstate Commerce Commission shall be adverse to the space [fol. 19] system, and if the rates established by it under whatever method or system is adopted shall be greater or less than the rates under this section, the Postmaster General shall readjust the compensation of the carriers on such selected routes and systems in accordance therewith, from the dates on which the rates named in this section became effective."

Thereafter, with the consent and approval of the Interstate Commerce Commission the Postmaster General placed each and all of the Land Grant Routes of your petitioner upon the space basis of pay for the purposes described in said act subject to readjustment in accordance with the final decision of the Interstate Commerce Commission as provided therein. Thereafter, in proceedings instituted in accordance with the provisions of said act the Interstate Commerce Commission by report and order, made by it in accordance therewith on December 23, 1919, in a proceeding entitled "Railway Mail Pay, Docket No. 9,200", found that the space basis of pay as inaugurated by the Postmaster General on the routes selected by him should continue in force thereon and should be extended to all other routes. For all services required to be performed by said act of July 28, 1916, and which were performed between November 1, 1916 and January 1, 1918, the Commission fixed and determined (subject to certain prescribed minima) as fair and reasonable rates of pay for all railway companies in the United States and over all routes, including Land Grant routes, the following scale of rates graduated according to the space required therefor, to-wit:

	Cents
For each mile of service by a 60-foot R. P. O. car.....	27
[fol. 20] For each mile of service by a 30-foot Apartment car	15
For each mile of service by a 15-foot Apartment car.....	10
For each mile of service by a 60-foot Storage car.....	28
For each mile of service by a 30-foot Storage space.....	15
For each mile of service by a 15-foot Storage space.....	8
For each mile of service by a 7-foot Storage space.....	4½
For each mile of service by a 3-foot Storage space.....	2½
For each mile of service by a 15-foot Closed-Pouch space.....	10
For each mile of service by a 7-foot Closed-Pouch space.....	5
For each mile of service by a 3-foot Closed-Pouch space.....	3

For all of said services required to be performed on and after January 1, 1918 the Commission fixed and determined, as fair and reasonable rates for all railroads and for all routes, rates 25 per centum in excess of the scale of rates last above set out. Subsequent to the rendition of said report and order by the said Commission the rates so fixed by said Commission as fair and reasonable have not been modified or altered by the said Commission and, at all times subsequent to its rendition, have been in full force and effect. The rates thus established by the Interstate Commerce Commission were based upon a statistical ascertainment of the cost of transporting the mails and of performing the additional services hereinbefore described, as determined by the proportion which the space furnished and provided for said services bore to the total space involved in [fol. 21] passenger train operation, and the reasonable compensation thereby fixed for each of the several classes of service required to be performed by said act of July 28, 1916, was measured and determined solely by the occupied and complementary space required to be furnished in connection therewith and graduated according to the amount of space authorized to be furnished in accordance with said act.

VI

The said act of July 28, 1916, among other things provides:

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only eighty per centum of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

In the said proceedings before the Interstate Commerce Commission your petitioner protested the application of the 80 per centum basis to the distribution space furnished thereunder on its land grant routes and asserted that the services required to be performed in the furnishing of said space were in addition to the obligation imposed upon it by said land grant acts and that it was

lawfully entitled for said services to the same compensation accruing therefor to carriers other than land grant carriers and accruing to your petitioner on its routes other than land grant routes. Notwithstanding said protest the said Commission held said 80 per centum basis to be applicable to distributing space furnished by your petitioner on its land grant routes, but in so doing did not establish said [fol. 22] 80 per cent basis as fair and reasonable compensation for the furnishing of distributing facilities on your petitioner's land grant routes, but on the contrary fixed the rates set forth in paragraph V hereof as fair and reasonable rates for all railroad companies over all routes, including land grant routes. Your petitioner has otherwise duly and seasonably protested the application of said eighty per centum basis to "distributing space" and has demanded of the Postmaster General that it be paid the full compensation therefor accruing to railroads other than land grant railroads for the same service.

Your petitioner avers that under the Land Grant Acts the duty of your petitioner is limited to the duty to transport the mails at such rates as may be fixed by Congress; that neither by the said Land Grant Acts, or otherwise, has your petitioner or any of its predecessors in interest, agreed, or is it bound, in addition thereto to furnish facilities for distribution on its trains or cars and to transport the distributing agents of the Post Office Department therein at such rates as may be fixed by Congress; that for all such additional service performed by your petitioner over its Land Grant Mileage, under the requirements of said act of July 28, 1916, it is lawfully entitled to just and reasonable compensation and to the same compensation accruing to it for the performance of a like service on that portion of its lines not embraced within its Land Grant Mileage, and to the same compensation accruing to all other carriers (not bound by the obligations of similar Land Grant Acts) for the performance of a like service at the said scheme and rates of pay fixed and determined by the Interstate Commerce Commission; and that by reason of the premises your petitioner is entitled under said act of July 28, 1916, to be paid pro rata for all distribution space furnished and hauled by it over its Land Grant Mileage under the requirements of said [fol. 23] act between June 1, 1917 and December 31, 1917, and from and after March 1, 1920, at the scheme and rates of pay established by the Interstate Commerce Commission for services performed in furnishing and hauling of railway post office cars for payment of which demand has been made by your petitioner of the Postmaster General by bills duly rendered. From time to time beginning May 13, 1920, and ending March 31, 1921, the Postmaster General purported to readjust the compensation due to your petitioner for all services performed between June 1, 1917 and January 1, 1918 at the rates lawfully due your petitioner for said services by reason of said decision of the Interstate Commerce Commission and has purported to make final settlement for all services rendered after March 1, 1920, up to and including December 31, 1923, but that, notwithstanding the making of demand and protest as aforesaid, all payments made by the Postmaster General and received by your

petitioner for all services so rendered over its Land Grant Mileage between June 1, 1917, and January 1, 1918, and from March 1, 1920, to December 31, 1923, have been made at the rate of 80 per centum of the rates fixed as fair and reasonable by the Interstate Commerce Commission for the services so rendered, without distinction as between space provided for the transportation of the mails and space provided for distribution, by reason whereof the said Postmaster General has wrongfully withheld from your petitioner and has declined and failed to pay to it for the services performed by it within said periods over its Land Grant Mileage the sum of One Hundred Eighty-nine Thousand Eight Hundred and Eighty and Fifty-four one-hundredths Dollars (\$189,880.54), to the full amount of which it is justly entitled under said act of July 28, 1916, together with the equivalent of interest at the rate of six per centum per annum, the amount owing to it on each of its several Land Grant routes, being [fol. 24] shown on Exhibit A, hereto attached and made a part hereof. Your petitioner further alleges that it was required and compelled under the said act of July 28, 1916, and the requirements of the Postmaster General thereunder to perform all said services and did perform the same under said compulsion; that if it had declined or failed to perform the said services it would have been subject to the fines and penalties imposed by said act for such failure or refusal and that it had no option but to perform the same as demanded; that it entered into no contract, express or implied, to perform the same for less than reasonable compensation and that it at no time, directly or impliedly, acquiesced in the performance of said services for less than reasonable compensation; that the reasonable value of the said services performed by it over its land grant routes in furnishing and hauling distributing space in railway post office cars, in carrying therein the agents and servants of the Post Office Department engaged in said service of distribution, and in performing all other services in connection with said distribution between June 1, 1917 and January 1, 1918, was not less than the sum of One hundred thirty-seven thousand eight hundred three and fifteen one hundredths dollars (\$137,803.15), for which it has been paid and has received to date the sum of One hundred ten thousand two hundred forty-two and fifty-two one hundredths dollars (\$110,242.52), and that the reasonable value of said services of like character performed by petitioner on its land grant routes between March 1, 1920 and December 31, 1923, was not less than the sum of Eight hundred eleven thousand five hundred ninety-nine and fifty-five one hundredths dollars (\$811,599.55), of which it has been paid and has received to date the sum of Six hundred forty-nine thousand two hundred seventy-nine and sixty-four one-hundredths dollars (\$649,279.64); by reason whereof the sum paid to it for the performance [fol. 25] of said services are less than the reasonable value therefor by not less than the said sum of One hundred eighty-nine thousand eight hundred and eighty and fifty-four one hundredths dollars (\$189,880.54), to the payment of which it is justly and lawfully entitled, together with the equivalent of interest at six per centum per annum. Your petitioner avers that no action has been had on

the said claim by Congress or by any of the executive departments of the Government other than as above stated; that your petitioner is the sole owner of the claim above set forth; that no assignment or transfer of the same or of any part thereof, or interest therein has been made; that there exists no debt, counterclaim, or set off by which the said claim may or should be reduced and that no part of the same has been paid; that your petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government and that it believes the facts as stated in this petition to be true.

Wherefore, your petitioner prays judgment against the United States in the sum of One Hundred Eighty-nine Thousand Eight Hundred and Eighty and Fifty-four one-hundredths Dollars (\$189,880.54), together with the equivalent of interest at six per centum per annum.

Missouri Pacific Railroad Company, by L. W. Baldwin,
President.

Attest: H. L. Utter, Secretary (Corporate Seal of Missouri Pacific Railroad Company.)

[fol. 26] Sworn to by L. W. Baldwin. Jurat omitted in printing.

[fol. 27]

EXHIBIT "A" TO AMENDED PETITION

Claim of Missouri Pacific Railroad Company

Period: June to December, Inclusive, 1917

Mail route number	Distributing space in railway post-office cars, length of car	Amount of claim
145,519	60 Foot	\$3,452.61
147,526	60 "	15,172.10
150,571 (Part 1)	60 "	6,011.81
145,505	30 "	453.26
147,517	30 "	2,403.07
147,525	30 "	19.24
145,537 (Part 1)	15 "	7.89
147,508	15 "	40.65

Total of claim for period shown..... \$27,569.63

Mail route number	Distributing space in railway post office cars, length of cars	March 1 to December 31, inclusive, 1920	Period		
			Calendar year, 1921	Calendar year, 1922	Calendar year, 1923
107,726	60 Foot	\$21,944.17	\$25,848.73	\$22,862.11	\$16,565.08
"	30 "	904.37	961.49	2,497.56	2,538.27
"	15 "	1,326.29	1,581.62	1,584.09	1,953.29
111,795	60 "	7,265.06	4,890.25	4,350.02	4,631.51
"	30 "	6,156.89	9,207.39	9,256.91	9,579.70
"	15 "	815.82	1,672.56	2,105.35	1,720.78
Total of claim for periods shown...		\$38,413.20	\$44,262.04	\$42,656.04	\$36,988.63
Grand total.....					\$189,880.54

[fol. 28] III. DEMURRER TO AMENDED PETITION—Filed July 9, 1924

Now comes the defendant by its Assistant Attorney General and demurs to the amended petition herein filed and for cause thereof shows:

First. The amended petition does not state a cause of action.

Second. The amended petition does not state a cause of action within the jurisdiction of this court.

Robert H. Lovett, Assistant Attorney General. Geo. H. Foster, Special Assistant to the Attorney General.

IV. SUBMISSION OF DEMURRER TO AMENDED PETITION—October 13, 1924

On October 13, 1924, the demurrer to the amended petition was submitted without argument.

[fol. 29] OPINION OF THE COURT BY BOOTH, J.—Entered January 19, 1925

BOOTH, Judge, delivered the opinion of the court:

On March 31, 1924, the court, in a written opinion by the Chief Justice, sustained a demurrer to plaintiff's petition. (59 C. Cls. 524.) Subsequently, on July 2, 1924, the plaintiff filed an amended petition, to which a demurrer was again interposed.

The extended brief of plaintiff in behalf of its amended petition puts forth no claim of new issues of law, and the amended petition is no more than an elaboration of the facts appearing in the original petition. As a matter of fact, no claim is made to the contrary. The court has gone over the case again, in view of the criticisms directed toward its opinion. We are unable to perceive any manifest error in the previous judgment of the court, and in our opinion the case as first presented is in no wise materially changed by the allegation of the amended petition. The issue remains the same, the record is identical in all substantial particulars, and in our judgment it would serve no useful purpose to do more than reaffirm what has already been expressed by the court in its opinion rendered March 31, 1924.

The demurrer will therefore be sustained and the amended petition dismissed. It is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 30] VI. OPINION OF CAMPBELL, Ch., J., REFERRED TO IN
OPINION BY BOOTH, J.—Filed March 31, 1924

CAMPBELL, Chief Justice, delivered the opinion of the court:

The case is before the court upon the defendant's demurrer to the petition. The petition alleges that plaintiff is (as to part of its system of lines) a land-aided railroad. It transports the mails and certain of the mail routes to which this case solely relates are on lines aided by land grants from the United States. See Act June 10, 1852, 10 Stat. 8, and Act February 9, 1853, 10 Stat. 155. The last-named act provides "That the United States mail shall at all times be transported on said road and branches under the direction of the Post Office Department at such price as Congress may by law direct."

It is alleged that by the Act of July 28, 1916, 39 Stat. 412, the system theretofore existing of providing for mail transportation and other and additional services by means of contracts between the Post Office Department and the carriers concerned "was terminated and it was made the duty of all railway companies" to provide the service prescribed by the act. Setting forth the dimensions of the different kinds of post-office cars when constructed according to specifications made by the Postmaster General and the assignment of space therein to the several incidents it is alleged that "neither said distributing facilities nor any part of the distribution space in railway post office cars are required or necessary for the purpose of transporting the United States mail and are not provided as an aid thereto, but solely for the purpose of enabling the Post Office Department to utilize the time in transit for the performance of the administrative function involved in distribution." It is further alleged that between June 1, 1917, and December 31, 1917 (when the roads went under Federal control), and from March 1, 1917, to the filing of the petition the plaintiff, by reason of the act of 1916 and the requirements made thereunder by the Postmaster General has furnished to the United States "over its land-grant mileage and elsewhere on its system of railroads services in addition to the service of transportation," that the extent of the additional space is measured by the proportion which the distribution space in railway post-office cars "furnished as stated," bears to the total space "in [fol. 31] the cars furnished in accordance with the said requirements." The suit is to recover for this so-called additional service, the plaintiff alleging that under the land-grant acts referred to its duty is limited to the duty to "transport" the mails, and that it is not bound to furnish facilities for this "distribution." The payments made to it for the land-grant mileage of its system have been at the rate of 80 per centum of the rates fixed as reasonable by the Interstate Commerce Commission for the service rendered "without distinction as between space provided for transportation of the mails and space provided for distribution," and as a consequence it is claimed that for the periods mentioned plaintiff has been deprived of the sum of \$152,891.91 to which it claims to be entitled.

The act of 1916 provided a method for determining the amount

7 of compensation the carriers should be paid for mail service. It gave the Postmaster General power to state railroad mail routes and authorized mail service thereon for four classes, namely: (1) Full railway post-office car service; (2) apartment railway post-office car service; (3) storage car service, and (4) closed pouch service, and the act defines each. The two first named, it is said, shall be service by cars (of forty feet or more in length in one class and less than forty feet in length in the other class), "constructed, fitted up and maintained for the distribution of mails on trains." It provides that service by these two classes "shall include the carriage therein of all mail matter, equipment, and supplies for the mail service" and the employees of the service. The rate of payment for the service authorized in accordance with this section 5 of the act are stated for each of the four classes of service named, and this statement of rates is followed by the provision:

"Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only eighty per centum of the compensation otherwise authorized by this section."

It is required that all cars and parts of cars used for the Railway Mail Service shall be of "such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General," and be constructed, maintained, heated, and cleaned at the carriers' expense. Railroad companies are required to furnish "all necessary facilities for caring for and handling" the mails while in their custody, and to "furnish all cars or parts of cars used in the transportation and distribution of the mails," except as in the act otherwise provided. The act empowers the Interstate Commerce Commission "to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith," and to prescribe the method by weight or space or otherwise and the procedure for such ascertainment of rates and compensation is set forth (p. 429). At the conclusion of the authorized hearing the commission is to establish by order "a fair, reasonable rate or compensation" to be received by the carriers for the transportation of mail matter and the service connected therewith," and this compensation the Postmaster General is authorized to pay out of the proper appropriation. It is also provided (p. 430) that:

11 [fol. 32] "Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings" (as in the procedure above referred to) "shall be had with respect to the rate or rates for service covered by said application."

After conferring on the commission for the purposes of section 5 all the powers it is authorized to exercise in the ascertainment of rates to be paid by private shippers, the act provides (p. 430):

"The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct, only eighty per cent of the compensation paid other railroads for transporting the mails and all service by the railroads in connection therewith."

This act makes or authorizes an important change in the method prevailing before its enactment for fixing the compensation of railroads handling the mails. Provision is made, however, for ascertaining just compensation and the procedure required by the act has been followed. The Interstate Commerce Commission has determined upon the space method in lieu of weight. The statute as already stated had provided for payment for service at so much for each mile of service by the different-sized cars. These rates were increased by the commission, and the petition avers that the commission fixed and determined for all services required to be performed by the act of 1916 and performed between the dates of November 1, 1916, and January 1, 1918, rates as follows:

	Cents
	Cents
For each mile of service by a 60-foot R. P. O. car	27
For each mile of service by a 30-foot apartment car	15
For each mile of service by a 15-foot apartment car	10
For each mile of service by a 60-foot storage car	28
For each mile of service by a 30-foot storage space	15
For each mile of service by a 15-foot storage space	8
For each mile of service by a 7-foot storage space	4½
For each mile of service by a 3-foot storage space	2½
For each mile of service by a 15-foot closed-pouch space	10
For each mile of service by a 7-foot closed-pouch space	5
For each mile of service by a 3-foot storage space	2½
For each mile of service by a 7-foot closed-pouch space	5
For each mile of service by a 3-foot closed-pouch space	3

For all of said service required to be performed on and after January 1, 1918, the commission fixed and determined, as fair and reasonable rates for all railroads and for all routes, rates 25 per centum in excess of the scale of rates last above set out. These rates have not been modified.

The Government challenges the court's jurisdiction. It is pointed out that if the action be based upon the act of 1916, a law of Congress, the facts show that the plaintiff has been paid in accordance with that act. If the act itself be not a valid exercise of its legislative power by Congress it would seem doubtful at least whether plaintiff was bound to do what the act enjoins. We think the act is valid

and that Congress intended that the compensation to land-aided roads should be determined and applied as has been done in this case. It is to be conceded that these statutes do not of themselves [fol. 33] devolve every kind of service that may be demanded or enjoined by the department or a statute. But on the other hand these same statutes are not to be so narrowly construed as to render their operation impracticable. When they declare that the mails shall be transported under the direction of the Post Office Department we think they imply more than the mere placing of the mails in bulk in a car to be carried between given termini. The bulk changes by additions to it and subtractions from it. The making of these additions and subtractions as the different stations are reached involve space additional to that occupied by the bulk itself. What is to be transported is not mere weight bulk or freight but the "mails" and the act must be construed to give effect to its purpose.

If the Post Office Department could give no directions relative to the service, the words authorizing them would not be in the statute. Nor do we think the directions thus authorized to be given are to be limited to the methods in vogue in 1853. The price for which the transportation under the direction of the department shall be made is "such price as Congress may by law direct." Whether this price is compensation or not is not the question, but the act of 1916 provides for the ascertainment of just compensation to the railroads for transporting the mails and rendering service in connection therewith. The just compensation thus fixed is not even questioned. Congress did not overlook the question that as to land-aided roads it could fix the price in accordance with the terms of the land-grant statutes. As early as 1876 they provided that land-aided roads should receive only 80 per cent of the compensation authorized by the act of that year, 19 Stat. 82, and the act of 1916 adopts the basis of 80 per cent, but applies it to the compensation which is to be paid other railroads, not alone for carrying the mails but for "all service" by the railroads in connection with transporting them. Manifestly Congress had in contemplation all manner of service which was to be required, and it limited the pay to land-aided roads to 80 per cent of what nonland-aided roads could receive for this service.

Unless this be true it cannot be affirmed that Congress fixed 80 per cent as the compensation for their mere conveyance. Having the right to fix the price for transportation (if the narrow view of that element be adopted), and if it be assumed that the other service, distribution for instance, was additional service that must be paid for at full rate, it is but reasonable to adopt the view that when Congress declared the land-aided road should be paid 80 per cent of the whole compensation fixed for all the kinds of service, its enactment implies that all these different elements were considered. Congress was not required to pay 80 per cent of the cost of transportation. It could have fixed "the price" at less. In certain acts there are provisions that the railroads shall be and remain public highways for the use of the Government, free of toll for the transportation of troops or property of the United States, and under these acts it was

held that the railroad was entitled to be paid for the use of its rolling stock or other personal property. For the actual service the proportion of 50 per cent for the highway and 50 per cent for the transportation was made. See *Lake Superior & Mississippi Railroad Co.* case, 93 U. S. 442. In the Army appropriation acts there will [fol. 34] generally be found provisions relative to payment to land-grant roads and to the effect that such roads for Army transportation shall not receive in excess of 50 per cent of the compensation to other roads for like service. See Army appropriation act, 39 Stat. 633. These instances serve to illustrate our view that by the act of 1916 Congress did not intend that for transportation alone, 80 per cent was to be allowed by the commission. Nor did it say that the commission having ascertained just compensation for a non-land-grant road should allow 80 per cent of a part of such compensation to the land-grant road.

The commission determined the compensation allowable for certain types of cars "for each mile of service," and the statute provides that the land-grant road shall receive 80 per cent of this compensation which the ascertained rate produces for each mile of service. The plaintiff has been paid accordingly. The ascertainment of the compensatory rate and the method to be adopted are confided to the commission and not to the Court of Claims. A carrier dissatisfied with the rates may apply to the commission for a reexamination with respect to the rates for service covered by the application. (Sec. 5, p. 430.) When Congress by this act established certain rates as applicable until action by the interstate Commerce Commission should be had it provided that land-grant roads should receive only 80 per cent of "the compensation otherwise authorized by this section." Congress went further and provided that these roads should receive only 80 per cent of the compensation paid other roads for transporting the mails and all other service. To say it was meant that land-grant roads should be paid for "transporting" the mails 80 per cent of what other roads were being paid for transportation and all service of every kind relative to the mails, and then be paid in addition for these other services, would be a most extreme position. The commission does not seem to have entertained such a view. See *Railway Mail Pay*, 56 L. C. C. 1. They fixed the value of an entire car on the mileage basis. Their decision follows the statutory method and does not itemize the values of the different portions of the car, whether used for one or another purpose. Considering the part of the act which prescribed 80 per cent land-grant roads, the Interstate Commerce Commission says (56 L. C. C. 77):

"It is contended by the railroads that this provision of law should not apply to the distributing space in R. P. O. and apartment cars, because the service of carrying distributing facilities can not properly be construed as transportation of the mails as defined in the law. As a matter of fact, a small quantity of mail is hauled in the racks and partitions of the distributing facilities. Its amount can not be ascertained, because it is constantly changing as the clerks in

charge distribute the mails en route. We are not convinced that Congress intended that services in connection with transporting the mails on land-grant railroads, such as furnishing and hauling distributing facilities, should not be subject to the reduction referred to."

The Act of 1916 was manifestly intended to provide a system for settling the differences between the Post Office Department and the transportation companies, that arose under the prevailing method. To this end the commission was empowered to "fix and determine" [fol. 35] the fair and reasonable rates and compensation for the transportation of "mail matter by railway common carriers and the service connected therewith" and to prescribe the method by weight, space or otherwise, to publish its orders, ascertaining the same, and these orders so made and published to continue in force "until changed by the commission after due notice and hearing." It is not questioned that the commission has discharged this duty and its rates are not objected to. Claiming that its action is based upon a law of Congress, the plaintiff asks to be paid a sum additional to what this same act allows. But we think the claim can not be under the statute and against it at the same time. In order to maintain the action, it is necessary for plaintiff to show a contract express or implied, "or a statute liability on the part of the defendants." *Ludington case*, 15 C. Cls. 453. If the Post Office Department had refused to pay plaintiff compensation fixed by the commission, it could have urged that its action therefor was based upon the law of Congress directing that payments be made in accordance with the commission's decision, but when plaintiff has been paid all the statute allows to be paid the action is not founded on the law. Nor is the action founded on the fifth amendment. See *North American Co. case*, 253 U. S. 330, 335. As we understand its contention, the plaintiff insists that the commission reported that in the different cars the full railway post-office 60-foot car, for instance, the total linear feet of space therein is made up of 36 feet of "distribution space," 8 feet (approximately) "of doorways" and 16 feet (approximately) of "storage space," but ascertained the compensation to be paid for a 60-foot railway post-office car 27 cents for each mile of service by it, and that therefore plaintiff should be paid at the rate of $36/60$ of 27 cents per mile and 80 per cent of $16/60$ of 27 cents for each mile of service, thus confining the land grant element to a supposed value of the "storage space." The commission has not ascertained the values of the space or fixed compensation in the way suggested. They fixed compensation for the car, and all its space. The act authorizes the Postmaster General to prescribe the kind of car and authorizes the commission to fix compensation on the space method. On the other hand, the court is not authorized to prescribe the method or fix compensation, and it can not assume that because the commission fixed a rate per mile for the entire car, it fixed, or intended to fix, a separate basis of compensation for each of the different spaces used in it. As already said, distribution of the mails can not be entirely separated from their transportation. The plaintiff has been paid for the service rendered in accordance

with the rates and compensation fixed by the commission, and, so far as appears, received the payments as they accrued without protest or objection. We think the demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 36] VII. JUDGMENT OF THE COURT—Jan. 19, 1925

This cause was submitted upon the defendant's demurrer to the plaintiff's petition as amended. On consideration whereof the court is of the opinion that the said demurrer is well taken. It is therefore ordered by the Court this 19th day of January, 1925, that the defendant's said demurrer to the plaintiff's petition as amended be and the same is sustained, and the petition is hereby dismissed.

By The Court.

VIII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed January 26, 1925

From the judgment rendered in the above-entitled cause on the 19th day of January, 1925, in favor of the defendant, the plaintiff by its attorney on the 26th day of January, 1925, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Fred H. Wood, Attorney for the Plaintiff.

IX. ORDER OF THE COURT ALLOWING PLAINTIFF'S APPLICATION FOR APPEAL—Feb. 2, 1925

It is ordered by the court this 2d day of February, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 37]

CLERK'S CERTIFICATE

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of the demurrer to the amended petition; of the opinion of the Court by Booth, J.; of the opinion by Campbell, Ch. J., referred to in said opinion; of the judgment

of the court; of the plaintiff's application for appeal; of the order of the court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 11th day of February, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal.)

Endorsed on cover: File No. 30,873. Court of Claims. Term No. 280. Missouri Pacific Railroad Company, appellant, vs. The United States. Filed February 16th, 1925. File No. 30,873.

(6878)